PREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 503

THE HUDSON OIL CO. OF MO., INC., a corporation, **Petitioner,**

v.

W. W. McLEOD; MAE J. McLEOD; R. K. YEAGER; ALINE H. JACKSON YEAGER; CLIFFORD H. JACKSON, JR.; SUE K. JACKSON; LILLIAN JACKSON WILLARD, individually and as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; FIRST NATIONAL BANK OF MOBILE, as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; and JOHNSON REAL ESTATE, INC., a corporation, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 19____

NO. _____

THE HUDSON OIL CO. OF MO., INC., a corporation,
Petitioner,

v.

W. W. McLEOD; MAE J. McLEOD; R. K. YEAGER; ALINE H. JACKSON YEAGER; CLIFFORD H. JACKSON, JR.; SUE K. JACKSON; LILLIAN JACKSON WILLARD, individually and as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; FIRST NATIONAL BANK OF MOBILE, as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; and JOHNSON REAL ESTATE, INC., a corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Hudson Oil Co. of Mo., Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 20, 1970.

OPINION BELOW

The opinion of the Court of Appeals, 424 F. 2d 1269 (1970) appears in the Appendix hereto. The opinion of the United States District Court for the Southern District of Alabama, Southern Division, not reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 20, 1970. A timely Petition for Rehearing was denied on June 23, 1970, and this Petition for Certiorari was filed within ninety days of that date. On July 10, 1970, the Court of Appeals granted a stay of mandate for thirty days from date of such order, which order appears in the Appendix hereto. This Court's jurisdiction is invoked under 28 U.S.C. S. 1254(1).

QUESTIONS PRESENTED

1. Does acceptance by a lessor of real estate of rentals from a lessee after the original rent term expires, and at increased rates provided in the lease for renewal terms, constitute waiver of notice requirements by the lessor?

2. Is a right of first refusal contained in a lease, assigned by an instrument of assignment, which does not expressly provide for its assignment?

STATUTORY PROVISIONS INVOLVED

No statute is directly involved in this appeal.

STATEMENT OF THE CASE

In 1955, Suraci leased a piece of property in Alabama from the individual respondents in the present case for a five-year term. The agreement contained a right of renewal for additional, five-year terms up to 1975 at increased rates of rent for each renewal term. The agreement also granted a right of first refusal to the lessee in the event the lessors wished to sell the property. In 1958, Suraci assigned the lease to petitioner Hudson Oil Company by written assignment which professed to assign the lease with renewal options, with all and singular the premises mentioned therein, but did not expressly mention the right of first refusal. From that time until now, petitioner remained in possession, made improvements and operated a service station. On June 3, 1960, the lessors, also respondents, entered into an option agreement with Motor Investment Corporation (the parent of respondent Johnson Real Estate, Inc.) whereby they agreed to sell the property to the optionee if the option was exercised within one year. The option was exercised and on June 15, 1964, title was conveyed. At this point petitioner claimed its right of first refusal and demanded that Johnson Real Estate (then owners of the property) convey the property to petitioner. This was refused and petitioner brought suit in the United States District Court for the Southern District of Alabama, Southern Division, based on diversity of the parties, for declaratory judgment and specific performance.

The District Court held for defendants on summary judgment on the following grounds: (1) The

right of first refusal was not assigned to petitioner by Suraci; (2) petitioner no longer held the right of first refusal anyway because it failed to renew the lease in time, and thus the original lease and its provisions expired in 1960 — approximately four years before petitioner attempted to exercise the right of first refusal. For petitioner to have made timely renewal of the lease, it was necessary to submit written notice of renewal before April 30, 1960 (six months before the first five-year term expired). Written notice dated April 25, 1960, was submitted on June 27, 1960, but the Court held that this notice was ineffective. However, petitioner continued in possession of the property and continued to pay rent on the property (at the increased renewal term rate as stipulated in the original lease) until the case went to court. In addition, the present owner accepted the rent payments and there was no evidence that the owner ever communicated to petitioner that the owner considered the lease not to be renewed.

On appeal, the Court of Appeals for the Fifth Circuit affirmed the District Court, holding that timely notice of renewal had not been given by petitioner, respondents' acceptance of increased rent did not constitute waiver of such notice, there was no renewal of the lease, and thus petitioner held no right of first refusal. The Court did not pass on the other question, i.e., whether the original lessee's assignment of the lease to petitioner also transferred the right of first refusal.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS

WITH APPLICABLE STATE LAW AS TO RENEWAL OF A LEASE BY CONDUCT CONSTITUTING WAIVER OF NOTICE.

The Court of Appeals holding that waiver must be manifested in some unequivocal manner and cannot be implied from acceptance of increased rent is directly contrary to the controlling case law of the State of Alabama wherein the action arose and the land involved is situated. The Supreme Court of Alabama in the case of **McIntyre v. Coker,** 274 Ala. 457, 150 So. 2d 229 (1963), held that acceptance of rent past the expiration of the original lease where there was no increase in rates was indication of intent to waive the requirement for timely notice of renewal.

It stated:

> "A lessee who enters into possession of the demised premises under a lease for a fixed term with the privilege of renewing it by giving written notice to the lessor, and continues in possession after the fixed term has expired, paying the rent therefor as it becomes due, thereby elects to exercise the option for a renewal although no written notice was given. In such a case the requirement of a written notice may be waived by the parties and a waiver may be implied when the lessee remains in possession and pays the rent to the lessor." (Cites cases)

In some jurisdictions, continued possession by the lessee and acceptance of rent at the same rate by the lessor is enough to permit a ruling of waiver of notice. **Lakeside Dairies v. Gregersen,** 217 La. 510,

46 So. 2d 752 (1950); **Adams v. Consolini,** 135 Conn. 321, 64 A.2d 44 (1949); **Noles v. Winn Oil Co.,** 30 Tenn. App. 227, 204 S.W.2d 539 (1947). This is the rule in Alabama, as the **McIntyre v. Coker** case, supra, reflects.

In every other jurisdiction in which applicable cases were found, where a lessor accepted rent from a lessee after the original rent term had expired and at increased rates given in the lease agreement for renewal terms, the courts held that this was adequate evidence to indicate waiver of notice requirements by the lessor. **Coulter v. Capitol Finance Co.,** 266 N.C. 214, 146 S.E.2d 97 (1966); **Lingle v. Wainwright,** 215 La. 117, 39 So2d 483 (1949); **see also** 50 **Am.Jur.**2d "Landlord and Tenant" S 1191, 78 (1970); 51 **C.J.S.** "Landlord and Tenant" S 77, 226-227 (1968). Some of these jurisdictions distinguish between situations where rentals have been accepted at the same rate or at an increased rate. The North Carolina Court in the case of **Coulter v. Capital Finance Co.,** supra, had ruled the year before in **Kearney v. Hare,** 265 N.C. 570, 144 S.E.2d 636 (1965), that mere acceptance of rent past the date of expiration was not enough to allow waiver. But in the **Coulter** case, supra, the additional fact that the rent was at an increased rate furnished sufficient grounds for the Court to allow waiver.

In short, not only does the decision of the Court of Appeals conflict with the express law in Alabama, but indeed conflicts with all other jurisdictions in which applicable cases of acceptance of rental at increased rates can be found.

The second question presented, concerning whether the right of first refusal passed to petitioner absent an express mention of it in the instrument of assignment, was not decided by the Court of Appeals; however, the District Court expressly found that this right of first refusal did not so pass to petitioner. In this instance the District Court was in error in that the general rule in the United States and the rule in Alabama is as set forth in 45 ALR2d, pages 1040-1041:

> "It is generally agreed that, absent a **manifestly contrary intention of the parties,** upon a valid assignment of a lease containing an option to purchase, the option, as a covenant running with the land, passes to the assignee, and may be enforced by him in the same manner and to the same extent as by the original lessee." (Emphasis supplied)

It cites **Autauga Cooperative Lease Association v. Ward,** 250 Ala. 229, 33 So.2d 904, as the Alabama authority therefor.

This aspect of the District Court's decision therefore also conflicts with applicable law holding assignment of "a certain lease," without exception, passes all rights under it.

Your petitioner would intend to urge and argue this latter point concerning the error of the District Court in the passing of the right of first refusal further, should certiorari be granted.

2. THE DECISION BELOW RAISES SIGNIFICANT AND IMPORTANT QUESTIONS CONCERNING REAL ESTATE LEASES.

The device of incorporating an option or right of first refusal with a lease and renewal option on real estate has become almost as common as the warranty deed. Many cases have arisen in Alabama and elsewhere on such leases. The holding of the Court of Appeals that "waiver cannot be implied from the facts here, including acceptance of increased rent," since directly in conflict with the applicable Alabama law, and indeed the rule in all other jurisdictions we can find, constitutes a complete departure from an otherwise accepted State rule.

Such a complete and clearly erroneous departure from the established applicable State law cannot help but lead to confusion and uncertainty concerning this significant area of real estate law and offers a singularly appropriate case for the assertion of the Court's review.

The clear error of the decision below in applying State law and the conflicts with State law therein raised justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

NO. 27304

THE HUDSON OIL CO. OF MO., INC.,
Appellant,

versus

W. W. McLEOD, MAE J. McLEOD, ET AL.
Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of 30 days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within 30 days from the date of this order there shall be filed with the clerk of this Court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of 30 days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this Court within that time.

DONE AT NEW ORLEANS, LA., THIS 10th day of July, 1970.

/s/ Robert A. Ainsworth, Jr.
UNITED STATES CIRCUIT JUDGE

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

NO. 27304

THE HUDSON OIL COMPANY OF MOBILE, INC.,
Plaintiff-Appellant,

versus

W. W. McLEOD, MAE J. McLEOD, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

(April 20, 1970)

Before BELL, AINSWORTH and CARSWELL, Circuit Judges.

AINSWORTH, Circuit Judge: In this diversity case plaintiff seeks a declaratory judgment and specific performance in connection with certain real property situated in the City of Mobile, Alabama. The District Court denied relief and we affirm.

In October 1955, appellees McLeod and wife entered into a written contract of lease of the property with one Matthew Suraci for rental of the property for a term of five years commencing November 1, 1955, with right of renewal for additional five-year terms up on October 31, 1975.

The lease agreement contained a provision sometimes referred to as "the right of first refusal," which reads as follows:

> 5. The lessor further agrees that should he desire and undertake to sell the leased premises or any portion thereof, he will first give the lessee the right and privilege of refusing to purchase same at the same price as that contained in any bona fide offer that the lessor is willing to accept."

In September 1957, McLeod and wife executed a deed to the effect that legal title to the real property involved was jointly in themselves and certain other individuals. On April 1, 1958, lessee Suraci executed a written assignment of the lease to Hudson Oil Company, appellant herein. The assignment concluded with the clause "To have and to hold the same unto the Hudson Oil Company and its assigns from the 11th day of March, 1958 for and during all the rest and remainder yet to come of, and in the term of, all years mentioned in the said lease, **subject to the rents, covenants and conditions contained in said lease.**" (Emphasis supplied.) The assignment did not expressly state that the right of first refusal contained in the original lease was also being assigned. The parties are in disagreement as to whether the assignment should be construed to transfer not only the lease but also the right of first refusal contained in the original lease agreement.

The first five-year term of the lease expired on October 31, 1960, and in order to renew the term for

the next five-year period commencing November 1, 1960, it was necessary for lessee to give six months' written notice of renewal prior to the expiration of the primary term. Written notice was necessary, therefore, on or before April 30, 1960. Appellant Hudson Oil Company contends that it gave "timely notice" of intenton to renew the lease to lessors, but when its counsel inquired whether such a notice had been received, being advised by the McLeods that it had not, caused a registered letter to be sent to lessors dated June 27, 1960 enclosing an unsigned copy of a purported notice of renewal dated April 25, 1960. If the April 25, 1960 notice had been received by April 30, 1960, it would have been timely. Hudson Oil Company continued in possession of the property and to pay rent at the increased amount provided for the renewal period.

On June 3, 1960, the owners of the property, appellees herein, entered into an option agreement with Motor Investment Corporation (the parent of appellee Johnson Real Estate, Inc.) to sell a certain large parcel of property in Mobile, Alabama, for $262,500 and in the same instrument also granted an option of buying the property involved in this case (which is adjacent to the large parcel) for the sum of $40,000. The option for the smaller parcel could be exercised in writing at any time within one year following the date of conveyance of the larger parcel to purchaser if the option to buy it was actually exercised. Thereafter, the option to purchase the larger parcel was exercised and deed conveying title to the purchaser was executed on December 4, 1961.

The option to purchase the smaller parcel—the property involved in this case—was thereafter exercised and the owners finally conveyed title thereto on June 15, 1964 to appellee Johnson Real Estate, Inc. Claiming that it had the right of first refusal under the original McLeod-Suraci lease, which it avers was assigned to it, Hudson Oil Company demanded that Johnson Real Estate, Inc. convey the property to it for the same consideration. On Johnson's refusal this suit by Hudson against Johnson and the former owners of the property, McLeod and wife and others, followed. Both plaintiff and defendants moved for summary judgment and the Court granted summary judgment in favor of defendants. In granting defendants' motion the District Court held that assignment of the lease by Suraci to Hudson Oil Company did not also transfer the right of first refusal; also that Hudson Oil Company failed to give timely notice to defendants of intention to exercise the option to renew the lease for an additional term of five years; that such failure terminated the lease agreement, and that at the end of the primary term Hudson was a tenant at will or a tenant on a month-to-month basis.

We do not find it necessary to reach the difficult question as to whether Suraci's assignment to Hudson Oil Company of the lease involving the property in this case, also conveyed the right of first refusal contained in the lease. We hold, in agreement with the District Judge that appellant Hudson Oil did not timely renew the lease. In its complaint Hudson alleges timely renewal and in the affidavit supporting its motion for summary judgment again states the conclusion that timely renewal was made. But the record

is devoid of proof to this effect and there is no statement, affidavit or proof of any kind that appellee owners of the property were notified by Hudson of intention to renew the lease. The first that McLeod and wife knew about the desire to renew the lease was contained in the registered letter of June 27, 1960 which enclosed a copy of the so-called April 26, 1960 written renewal. Nor does the record justify a finding of waiver of notice within the Alabama rule of **McIntyre v. Coker,** 274 Ala. 457, 150 So. 2d 220 (1963). Waiver cannot be implied from the facts here, including acceptance of increased rent. It must be manifested in some unequivocal manner not found here. **Liverpool & London & Globe Ins. Co v. Dickinson,** 242 Ala. 107, 5 So. 2d 90 (1941). We hold, therefore, that the District Judge's ruling was correct, that there was no timely renewal, and that the lease of the property expired by its terms on October 31, 1960. The right of first renewal, if it existed by assignment from Suraci—and we do not decide this—would have subsisted until the expiration of the primary term of the lease. Thus appellant contends that the granting of the option by appellee owners on June 3, 1960 to Motor Investment Corporation was a breach of the agreement to grant the right of first refusal to lessee and, therefore, that it was unnecessary for the Court to decide whether the lease was renewed since the alleged breach of contract occurred during the primary term of the lease.

We are unable to agree with this contention because the June 3, 1960 option which granted the right to purchase the larger parcel of ground (not involved in this case) also granted an option within one year

to purchase the property involved here provided, however, that the first option was exercised and title actually taken to the larger parcel. It cannot be said, therefore, that before October 31, 1960, the date of the expiration of the primary term of the lease, appellee owners had undertaken to sell the leased premises. All they had done was grant an option on a larger parcel conditional upon another option to purchase the property involved here, and it was not until December 4, 1961, that the option to purchase the larger parcel was exercised and title actually conveyed. Occurrence of this event triggered the right of optionee to purchase the property involved here within one year, and that option was ultimately exercised and title transferred on June 16, 1964. There was, therefore, no breach of the right of first refusal if in fact such a right existed in Hudson Oil, appellant herein. As appellant's counsel states it (in a lower court brief brought to our attention by opposing counsel):

> " . . . the option of June, 1960, is not by its terms binding upon anybody as far as the parties thereto were concerned. An examination of its terms shows that, first of all, the parties agreed, while giving an option on other lands, to later give an option on the land involved in this law suit. Secondly, the document expressly says that if any title defect occurred, each party is excused from performance. It should be quite apparent that the Hudson situation is such a title defect as would excuse performance."

Since the facts disclose, therefore, that the lease

was not timely renewed, expired by its terms on October 31, 1960, and no firm agreement to sell the property was made until long after the expiration of the date of the primary term of the lease, the District Court's holding in this regard was correct.

It is unnecessary that we consider any of the other issues raised by the parties since our decision here fully determines the case.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 1969

NO. 27304

D. C. Docket No. CA 3963-65

THE HUDSON OIL COMPANY OF MOBILE, INC.,
Plaintiff-Appellant,

versus

W. W. McLEOD, MAE J. McLEOD, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

Before BELL, AINSWORTH and CARSWELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 20, 1970

Issued As Mandate:

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

For The Fifth Circuit

NO. 27304

THE HUDSON OIL COMPANY OF MOBILE, INC.,
Plaintiff-Appellant,

versus

W. W. McLEOD, MAE J. McLEOD, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(June 23, 1970)

ON PETITION FOR REHEARING

Before BELL and AINSWORTH
Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

* Judge Carswell was a member of the panel originally deciding this case but did not participate in this decision.

APPENDIX E

IN THE

UNITED STATES DISTRICT COURT

For The Southern District Of Alabama

Southern Division

CIVIL ACTION NO. 3953-65

THE HUDSON OIL COMPANY OF MOBILE, INC., a corporation,

Plaintiff,

v.

W. W. McLEOD MAE J. McLEOD, R. K. YEAGER, ALINE H. JACKSON YEAGER, CLIFFORD H. JACKSON, JR., SUE K. JACKSON, LILLIAN JACKSON WILLARD, individually an as co-executor and co-trustee of the will of E. E. WILLARD, deceased, FIRST NATIONAL BANK OF MOBILE, as co-executor and co-trustee of the will of E. E. WILLARD, deceased, and JOHNSON REAL ESTATE, INC., a corporation,

Defendants.

ORDER

This matter comes before the Court on the motion of the plaintiff herein, Hudson Oil Company of

Mobile, Inc., requesting the Court to grant Summary Judgment in its favor. The motion was filed on May 14, 1968, and on July 12, 1968, this matter was specially set for oral hearing. After argument of counsel, the motion was taken under submission by the court. By supplemental briefs, the party defendants join the plaintiff in requesting that this litigation be disposed of by summary judgment.

This litigation revolves upon the construction of a lease entered into by the defendants McLeod, Willard and Jackson with a third person who is not a party to this litigation. The third person assigned the lease to Hudson Oil Company, who now asserts the full rights of the original lessee. The Court has carefully considered the pleadings and exhibits thereto, the answers to the request for admissions and the applicable law, and enters its findings herein.

The Court finds that the plaintiff did not receive the right of first refusal when the assignment of the lease was executed by the original lessee. The Court finds that the original lessee retained such right but the Court makes no finding as to the enforceability of the right, inasmuch as the original lessee is not a party to this suit.

The Court finds that the plaintiff failed to give timely notice to the named defendants of the plaintiff's intention to exercise the option to renew the lease for a term equal to the primary term. Such failure by the plaintiff terminated the lease agreement and at the end of the primary term rendered the

plaintiff a tenant at will or a tenant on a month to month basis.

The Court further finds that the plaintiff's claim against the estate of E. E. Willard is forever barred by the Alabama Statute of Non-Claim, Title 61, Section 211, Alabama Code.

The Court directs the Clerk of the Court, thirty days hereinafter provided no appeal is taken from this order, to release all checks and monies held pending the disposition of this litigation to defendant Johnson Real Estate, Inc., as the proper party to receive the accrued rent. The plaintiff is hereby directed to substitute any checks now on deposit which are not payable to Johnson Real Estate, Inc. for checks of like amount payable to Johnson Real Estate, Inc.

It is further ORDERED, ADJUDGED and DECREED by the Court that plaintiff's motion for summary judgment is hereby DENIED and summary judgment for the party defendants should be and is hereby GRANTED and this cause is hereby DISMISSED.

Costs taxed to the plaintiff.

DONE in Mobile, Alabama, this the 30th day of September, 1968.

Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

IN THE

Supreme Court of the United States

OCTOBER TERM, 19__

NO. _____

THE HUDSON OIL CO. OF MO., INC., a corporation, **Petitioner,**

v.

W. W. McLEOD; MAE J. McLEOD; R. K. YEAGER; ALINE H. JACKSON YEAGER; CLIFFORD H. JACKSON, JR.; SUE K. JACKSON; LILLIAN JACKSON WILLARD, individually and as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; FIRST NATIONAL BANK OF MOBILE, as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; and JOHNSON REAL ESTATE, INC., a corporation, **Respondents.**

CERTIFICATE OF SERVICE

I, Michael J. Salmon, counsel for petitioner herein and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 4th day of August, 1970, I served three copies of the foregoing Petition for a Writ of Certiorari to the United States Fifth Circuit Court of Appeals on Mr. Alvin McConnell, one of the counsel for Johnson Real Estate, Inc., one of the respondents in the above-styled case, by mailing the same to him, postage prepaid, at 802 Van Antwerp Building, Mobile, Alabama.

I further certify that on the 4th day of August, 1970, I served three copies of the foregoing

Petition for a Writ of Certiorari to the United States Fifth Circuit Court of Appeals on Mr. Jere Austill, Jr., counsel for the respondents in this cause other than Johnson Real Estate, Inc., by mailing the same to him, postage prepaid, at 1005 Van Antwerp Building, Mobile, Alabama.

I further certify that on the 4th day of August, 1970, I served three copies of the foregoing Petition for a Writ of Certiorari to the United States Fifth Circuit Court of Appeals on Mr. Frederic D. Dassori, one of the counsel for Johnson Real Estate, Inc., one of the respondents in the above-styled cause, by mailing the same to him, postage prepaid, at 3000 Connecticut Avenue, Washington, D.C. 20008.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 503

THE HUDSON OIL CO. OF MO., INC., a corporation,
Petitioner,

v.

W. W. McLEOD; MAE J. McLEOD; R. K. YEAGER; ALINE H. JACKSON YEAGER; CLIFFORD H. JACKSON, JR.; SUE K. JACKSON; LILLIAN JACKSON WILLARD, individually and as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; FIRST NATIONAL BANK OF MOBILE, as co-executor and co-trustee of the will of E. E. WILLARD, Deceased; and JOHNSON REAL ESTATE, INC., a corporation,
Respondents.

BRIEF OF RESPONDENT JOHNSON REAL ESTATE, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In October 1955 Mr. E. E. Willard, Mr. Clifford H. Jackson and Mr. and Mrs. W. W. McLeod were the owners (though Mr. and Mrs. McLeod were the record owners) of two parcels of land fronting on New U.S. Highway 90 (the newly constructed highway) in the City and County of Mobile, Alabama. One parcel, hereinafter called the Large Parcel, had a frontage of 735 feet and the other parcel was a triangular parcel fronting 220 feet on the highway, the two parcels being separated by a third parcel with a frontage of approximately 50 feet, owned by one Prince. (A. 87, 113, 200, 246, 247, 248 & 255)

It is the triangular parcel which is involved in this lawsuit.

Mr. Willard handled all of the business and business transactions relating to these two parcels of land until his death on October 31, 1962. (A. 260, 264)

Mr. Willard negotiated a lease on the triangular parcel with one Matthew Suraci (hereinafter called Suraci) for use as a gasoline service station. The lease was dated in October 1955 and was signed by Mr. and Mrs. McLeod, as Lessors, and by Mr. Suraci as Lessee, though neither Mr. or Mrs. McLeod had any personal contact or coversations with Mr. Suraci in connection with the negotiations, execution or delivery of the lease, or otherwise, though monthly rentals were paid to them. (A. 260, 264)

The lease (A. 12-23) was for a primary term of five years beginning November 1, 1955 and ending October 31, 1960.

The lease provided that the Lessee should have the right, at his option, to renew the lease for an additional five years after the expiration of the primary term "by giving Lessor written notice of his election to exercise such option of renewal at least six months prior to the expiration of the primary term hereof."

The lease also provided for two additional options to the Lessee to further renew the lease for two additional periods of five years each by giving Lessor similar written notice.

The lease provided that the Lessee should have the right, at the end of the primary term or at the end of any renewal term if the lease were renewed, to remove all of his personal property, including any equipment or fixtures such as gasoline or oil pumps or tanks or other like articles notwithstanding the same might be attached to the realty, but that all buildings of any kind or other like improvements would be the sole property of the Lessor provided however that should Lessor desire, he might require Lessee to remove all such improvements and leave the premises in a level condition free of trash.

The lease also contained the following provision:

"The Lessor further agrees that should he

> desire and undertake to sell the leased premises or any portion thereof, he will first give the Lessee the right and privilege of refusing to purchase same at the same price as that contained in any bona fide offer that the Lessor is willing to accept."

Subsequently Mr. Jackson died testate leaving all of his property to his widow, Aline H. Jackson, (now Yeager) and his son, Clifford H. Jackson, Jr. (A. 56)

On September 11, 1957 Mr. and Mrs. McLeod executed a deed, which was duly then recorded, by which title to the properties hereinabove referred to was shown to be in E. E. Willard and the abovementioned devisees of C. H. Jackson, deceased, along with the McLeods. (A. 56-62)

Suraci operated a gasoline service station on this property until on April 1, 1958 he executed an instrument of assignment to Hudson Oil Co. of Mo., Inc. by which he assigned the lease for the primary term hereinabove referred to, "together with renewal options, with all and singular the premises therein mentioned and described and the buildings thereon together with the appurtenances thereon." In delineating those things which were assigned, no mention was made of the right of first refusal and no reference to this right of first refusal was made anywhere in the assignment instrument. (A. 272)

Following the signature of Suraci to this assignment is the following, which was signed by C. H. Jackson, Jr., Sue F. Jackson, Aline H. Yeager, R. K. Yeager, E. E. Willard, Lillian Willard, Mae J. McLeod and W. W. McLeod:

> "The undersigned Lessors hereby consent to the above assignment waiving none of their rights under said lease as to Lessees or assigns."

Hudson Oil Co. of Mo., Inc. hereinafter called Hudson, Appellant-Petitioner in this cause, thereafter operated the gasoline service station on this property.

In the early part of June 1960 Mr. Willard came to the store operated by Mr. and Mrs. McLeod and inquired of them as to whether either of them had received any notice from Hudson or Suraci that they intended to extend the lease past the expiration date of October 31, 1960. At this time Mr. and Mrs. McLeod knew that the lease required six months written notice of election to exercise the option to renew the lease and that, if the Lessee desired to renew, such notice had to have been given before May 1, 1960. No such notice had been received by Mr. and Mrs. McLeod and they so advised Mr. Willard.

Thereafter and on June 10, 1960, (this being the date of the acknowledgment before the Notary Public) Mr. Willard and wife, Mr. and Mrs. McLeod,

Clifford H. Jackson, Jr. and wife, and Aline H. Yeager (nee Jackson) and husband signed and delivered an option agreement which Mr. Willard had negotiated, with Motor Investment Corporation granting it an option to buy the aforesaid large parcel for $262,500.00, which option agreement also provided that, in substance, Motor Investment Corporation was to have an option to buy the triangular parcel for $40,000.00 payable $10,000.00 down and the balance, evidenced by note for $30,000.00 and secured by Vendor's Lien Deed, payable in 300 equal monthly payments, which option could be exercised by notice in writing at any time within one year following the date of closing of the sale resulting from the exercise of the option to purchase the large parcel, the effect of which was to make this option to purchase the triangular parcel contingent and dependent upon exercise of the option to purchase the large parcel and the closing of the sale and taking title thereto. The McLeods knew, at the time they signed this agreement that the lease had not been renewed or extended beyond October 31, 1960. (A. 205-215, 258, 259 and 262)

Subsequently and on June 27, 1960, Mr. Hayden Rector, Attorney for Hudson, telephoned the McLeods and asked them if they had received any notice from Hudson notifying them that Hudson intended to extend the Suraci lease for an additional period after October 31, 1960. The McLeods told Mr. Rector that they had not received any such notice. (A. 262, 263, 91)

A few days thereafter the McLeods received a

registered letter dated June 27, 1960 from Hudson and addressed to them, enclosing a photocopy of an unsigned copy of a letter purporting to be dated April 25, 1960 by Hudson addressed to Mr. and Mrs. McLeod and purporting to give six months written notice to exercise option to renew the lease for an additional five years commencing November 1, 1960 and purporting to request the McLeods to acknowledge receipt thereof. (A. 259, 263, 89, 90)

Mr. and Mrs. McLeod never received any letter from Hudson dated April 25, 1960 (except that a copy was enclosed in the registered letter of June 27, 1960 which they did receive, as aforesaid) and never received any letter or notice from either Hudson or Suraci relating to the exercise of option to renew the lease for a period beyond October 31, 1960 (except said registered letter of June 27, 1960 with its aforesaid enclosure). There is no averment, affidavit, statement or any other evidence, in this case that a letter, alleged copy of which, dated April 25, 1960, was enclosed in said registered letter dated June 27, 1960, was in fact written and or signed by Hudson or was in fact mailed to the McLeods on April 25, 1960, or any other date (other than by enclosing a copy thereof in the registered letter of June 27, 1960). The registered letter of June 27, 1960 itself does not say that the alleged letter of April 25, 1960, copy of which was enclosed therewith, had been mailed. (A. 259, 260, 263)

When the registered letter dated June 27, 1960,

enclosing copy of an alleged letter dated April 25, 1960, was received by the McLeods, they took it to Mr. Willard or notified him that it had been received and he stated to them that the letter had been received too late and that the deal with Motor Investment Corporation had already been signed and that the Hudson Oil Co. lease would expire in October 1960. (A. 260)

Motor Investment Corporation exercised its option to purchase the large parcel and after some delay, occasioned by the necessity for having the property rezoned and the filing and processing of a lawsuit to clear restrictions thereon, closed the trade for this large parcel and acquired a deed thereto on December 4, 1961, which deed provided for an option to purchase the triangular parcel, exercisable within one year. This deed was then recorded. (A. 249)

The purpose of Motor Investment Corporation in acquiring the option to purchase said large parcel and acquiring title thereto was for use thereof for the construction of facilities for and operation therefrom of the automobile sales and service business of Johnson Chevrolet, Inc., a related corporation. In 1962, soil tests indicated the advisability of changing the type of building and location thereof on the property, as originally planned, and the consequent advisability of acquiring and using in connection therewith the Prince property and said triangular parcel, the latter to be a part of the used car lot. Arrangements were made to purchase the Prince property and Motor Investment Corporation exercised its op-

tion to purchase said triangular parcel. Thereafter the title to the Prince property was acquired and subsequently Motor Investment Corporation assigned its option on the triangular parcel to Johnson Real Estate, Inc., another related corporation, (hereinafter called Johnson) which took title by Vendor's Lien Deed dated June 15, 1964, the interest of Mr. Willard, deceased, being thereby conveyed by his widow individually and by her and The First National Bank of Mobile as Executors and Trustees under the last will of Mr. Willard. Mr. Fred Dassori, who handled this matter on behalf of Motor Investment Corporation and Johnson, understood at this time and prior thereto that the Suraci-Hudson lease had not been renewed and did not know of any contention, if any, on the part of Hudson that the lease had been renewed. (A. 250, 253, 248, 249)

Such changed plans were followed in the construction of the building, the building and plant costing, exclusive of land costs, in excess of $500,000.00. (A. 254)

Promptly after the execution of said deed dated June 15, 1964, the Grantors in that deed notified Hudson of such conveyance and that rents should thereafter be paid to Johnson and Johnson also promptly notified Hudson of this purchase and advised it that it might remain in possession of the premises until further notice as a month to month tenant. Hudson thereafter forwarded to Johnson its check dated July 1, 1964 covering rent for the month

of July 1964, but thereafter stopped payment thereon and so notified Johnson by letter advising that it was in possession of the property under the aforesaid lease and requesting full information as to the terms and conditions of the purchase so it could consider whether or not it wished to exercise the right of first refusal contained in said lease. (A. 93, 221, 222, 251, 252, 174)

Thereafter, Johnson, through Mr. Dassori, had conferences and correspondence with Hudson and its Attorney, Mr. Rector, with respect to Hudson's alleged rights until the complaint in this case was filed. (A. 88, 93, 200)

Meantime no rent was tendered or paid to Johnson, though Hudson tendered monthly rent checks to the McLeods who did not accept but returned the same with the statement that it was not they but Johnson who was entitled to such rents, and this continued to and after the time the complaint was filed until at some point in the course of this litigation, Hudson started paying such rent to the Clerk of the Court who of course retains the same. (A. 88, 93, 200)

Neither Hudson nor Mr. Rector, prior to filing of this suit, unequivocally notified Johnson that it desired to purchase the property for the same price paid therefor by Johnson, though by letter dated August 20, 1964, Mr. Rector did state that Hudson wished to exercise its option to purchase the prop-

erty on the terms outlined in the Vendor's Lien Deed to Johnson and was prepared to reimburse Johnson for the amount so far paid towards the purchase price and to receive an assignment of the Vendor's Lien from Johnson in favor of Hudson, and Johnson also received copy of a letter by Mr. Rector dated September 27, 1965 addressed to the McLeods, in which Mr. Rector stated that Hudson desired to exercise its privilege to purchase the property for the same price and under the same terms and conditions as those contained in the warranty deed with Vendor's Lien to Johnson. No purchase money was ever tendered and none brought into Court. (A. 191, 174)

On or about December 17, 1965 Hudson filed suit in the United States District Court at Mobile, Alabama (jurisdiction being based upon diversity of citizenship of the parties) averring the execution and contents of the lease, the instrument of assignment and the Vendor's Lien Deed to Johnson, respectively, averring that it, Hudson, "gave timely notice of renewal" of said lease for another five year term commencing November 1, 1960 and that the Grantors in said deed to Johnson had failed to extend to Johnson the rights granted under the "option to purchase" in the lease and that it had given notice to all defendants of its desire to exercise such option and defendants had failed to convey the property to it and refused to recognize its right under said lease, averring that it was and had been in possession of the property since said assignment, paying rentals therefor to the McLeods, had made "extensive and costly improve-

ments thereon" and that on the execution of said deed, Johnson had advised it that it owned the property and that it might remain in possession of the premises until further notice as a month to month tenant and that it had continued to tender rentals to the McLeods. The complaint prayed for declaratory relief that Hudson was entitled to all rights of the lessee by reason of said assignment, that it was entitled to purchase the property involved for the same price and under the same conditions as those contained in the conveyance to Johnson and that the deed to Johnson is null and void, and prayed, as supplementary relief, that the Court would specifically enforce the option contract of purchase and decree that Plaintiff was entitled to a deed to the property involved on payment of the purchase money and performance of such conditions as the Court should decree and enter an order cancelling and annulling the said deed to Johnson and further praying damages and Attorney's fees and, in the alternative that if the Court failed to grant relief as prayed for "the Court would order defendant to pay Plaintiff damages for the value of the improvements made by Plaintiff on the premises."

The answers of Johnson and the other Defendants, among other things, denied that Plaintiff had any right to purchase the property under the terms of said lease, denied that the assignment had transferred any right to purchase to Plaintiff, denied that Plaintiff had given timely notice of renewal of said lease for another five year term commencing November 1, 1960 and averred that they were without

information or knowledge as to any improvements made on the premises by Plaintiff, Johnson further averring in its answer that it was entitled to all rentals from the date of the deed to it and praying that the Court, in granting declaratory relief, would deny the relief prayed for by Plaintiff and would declare that Plaintiff acquired no rights to purchase said property by virtue of said assignment and had no right to specific performance and that Plaintiff had failed to give notice of this election to exercise the option to renew said lease for a term of five years after the expiration of the primary term thereof at least six months prior to the expiration of said primary term and that said lease was not renewed and expired on October 31, 1960 and that since Johnson's purchase of the property in 1964 Plaintiff had been a tenant of Johnson on a month to month basis and is liable to Johnson for rental thereof or for use and occupation thereof and that the Court would ascertain the amount of such rental or indebtedness and interest and would order Plaintiff to forthwith pay the same to Johnson.

Hudson filed motion for summary judgment.

Neither Johnson nor any of the Grantors in the deed to Johnson (all being Respondents in this cause) had any knowledge of any improvements made on the premises by [redacted] Hudson. They did, of course, know that a gasoline service station was being operated from the premises and that someone had put in gas pumps and a station office. Affidavit of Hudson contained the bald conclusion that Hudson . . . "made

extensive and costly improvements which were made from the onset of its occupancy until June of 1964." Other than this there is nothing in the record with respect thereto and no indication anywhere as to the nature of such "improvements," whether gasoline pumps or tanks or what, nor with respect to the cost thereof nor when and how made or installed. (A. 88, 114, 200, 176, 189)

As hereinabove stated, there is no evidence of any kind that any notice of exercise of option to renew the lease for a period beyond the expiration of the primary term on October 31, 1960 was written or signed or delivered or mailed to the McLeods or any other owner of the property at least six months prior to the expiration of said primary term as provided for in the lease, and no evidence that Hudson "gave timely notice of renewal" of said lease for another five year term commencing November 1, 1960, as averred in the complaint except the bald conclusion in Hudson's affidavit that "Hudson gave timely notice of a renewal of the lease for a second five year term commencing November 1, 1960 and as required by the terms of the lease." There is no evidence that Hudson, prior to the conveyance of the property to Johnson, took the position that the lease was renewed nor that it had advised or made known to Mr. Willard or anyone else that it considered or took the position that the lease was renewed. Mr. Willard was dead at the time the complaint was filed and of course did not testify and Hudson offered no evidence as to whether or not Mr. Willard had made known to Hudson his position and that of the

other owners that the lease was not renewed nor as to whether or not Mr. Willard had any conversation or correspondence with Hudson or its representatives with respect to the occupancy of the property by Hudson subsequent to November 1, 1960 or the status of Hudson thereafter with respect to the property involved.

In fact, at the hearing on motion for summary judgment and in Hudson's memorandum brief in support thereof referred to and filed at this hearing, Hudson in effect abandoned the theory that the lease had been renewed by virtue of a timely notice of election to renew given as required by the lease, and sought to rely upon the principles of implied waiver, citing the case of **McIntyre** vs. **Coker**, 274 Ala. 457, 150 So. 2d 220. (A. 226) The Trial Court found that the lease had not been renewed beyond its primary term and that thereafter Hudson was a tenant at will or tenant on a month to month basis. The Circuit Court of Appeals held that the record in this case does not justify a finding of waiver of notice within the Alabama rule of McIntyre vs. Coker and that "waiver cannot be implied **from the facts here**, including acceptance of increased rent," (underscoring ours) and that the lease expired on October 31, 1960.

WITH RESPECT TO THE REASONS RELIED ON BY PETITIONER FOR THE ALLOWANCE OF THE WRIT:

1. With respect to Petitioner's reason No. 1 that

the decision below conflicts with applicable state law as to renewal of a lease by conduct constituting waiver of notice:

The case of **McIntyre vs. Coker,** 274 Ala. 457, 150 So. 2d 220, cited by Appellant-Petitioner as the law of Alabama with which the decision of the Court below is alleged to conflict, held that where a lease provided that the Lessee had the privilege of renewing the lease by giving Lessor written notice of intention to renew at least thirty days prior to the expiration of the primary term, "the requirement of written notice may be waived by the parties and a waiver **may be** implied when the Lessee remains in possession and pays rent to the Lessor," (underscoring ours) and held that under the circumstances and facts involved in that case, the lease involved was effectively renewed.

The Supreme Court of Alabama in the case of **Liverpool and London and Globe Insurance Company vs. Dickenson,** 242 Ala. 107, 5 So. 2d 90 said:

> "The question of waiver, through voluntary surrender of a known right, is in the main a question of intention, and the authorities hold that, to be effectual, it must be manifested in some unequivocal manner; if not express, then by such language or conduct as to evince clearly the intention to surrender (citing cases)."

The Circuit Court of Appeals in the case at hand did not hold, as Petitioner in its petition says it did, that a waiver **cannot** be implied from acceptance of increased rent, period. (underscoring ours). It simply held that the record does not justify a finding of waiver within the Alabama rule of **McIntyre vs. Coker** and that a waiver cannot be implied from the facts here, including acceptance of increased rent. In short, the Circuit Court of Appeals simply found that under all the facts in this case that was no waiver of the requirement of written notice.

Not only is this not in conflict with Alabama State Law but on the contrary is in recognition of and consistent with Alabama State Law and, while the laws of other states are not here involved, this is not in conflict with the laws of any other state, so far as we can find, and certainly not in conflict with the decisions from other jurisdictions cited by Petitioner.

Petitioner refers to a second question allegedly presented, concerning whether the right of first refusal passed to Petitioner by the instrument of assignment to it. The District Court found that the lease had not been renewed and while it unnecessarily also found that the right of first refusal did not so pass to Petitioner, the Circuit Court of Appeals very properly held that in view of its finding that the lease was not renewed, it was not necessary for it to decide the question as to whether the instrument of assignment also conveyed the right of first refusal.

Since the Court of Appeals made no decision on this question, it can hardly be said that its decision on this question conflicts with applicable state law and it appears to us that there is in this aspect of the matter no element of a reason to be relied upon for the allowance of the Writ.

2. With respect to Petitioner's reason No. 2 that the decision below raises significant and important questions concerning real estate leases:

It is submitted that the decision of the Circuit Court of Appeals does not raise any such questions and that Petitioner has not shown wherein it does. The law of Alabama in this regard is the same now as it was before the decision of the Circuit Court of Appeals in this case and nothing in the decision of the Circuit Court of Appeals purports to change it nor deviate from it.

CONCLUSION

No reason has been advanced by Petitioner for the allowance of the Writ and we submit that no reason for the allowance of the Writ exists in this case and that the application for the Writ should be denied.

Respectfully submitted,

Frederic D. Dassori
3000 Connecticut Avenue
Washington, D.C. 20008
Counsel for Respondent Johnson Real Estate, Inc.

Alvin McConnell
Kearley & McConnell
Van Antwerp Building
Mobile, Alabama 36602
Counsel for Respondent Johnson Real Estate, Inc.

MEMO: References in Statement of the Case are to the Appendix as filed in the Circuit Court of Appeals in this matter.

CERTIFICATE OF SERVICE

I, Frederic D. Dassori, Counsel for Respondent Johnson Real Estate, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that I served three copies of the within brief on each other party separately represented in this proceeding by mailing three copies of this brief to Mr. Michael J. Salmon, counsel for Petitioner, addressed to him at his post office address, 324 International Trade Center, Mobile, Alabama 36602, first class air mail prepaid postage and by mailing three copies of this brief to Mr. Jere Austill, Jr., counsel for the Respondents in this cause other than Johnson Real Estate, Inc., first class air mail prepaid postage, addressed to him at his post office address, 1005 Van Antwerp Building, all on this ——— day of ———————, 1970.

FREDERIC D. DASSORI

CERTIORARI DENIED N.C.R.

IN THE

Supreme Court of the United States

OCTOBER TERM, 19

No.

ARLENE E. DALY

Petitioner

VS.

GEORGE D. DALY, JR.

Respondent

Petition for a Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

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DECISIONS BELOW

There was no report of the trial court's decision.

The decision of the Supreme Court of Appeals of Virginia on March 10, 1970, refused petitioner's appeal. A copy of said decision is annexed in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Appeals of

Virginia was entered on March 10, 1970. There were no petitions for rehearing. On June 9, 1970, Chief Justice Berger granted an extension to and including August 7, 1970, within which to file Petition for Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to U. S. C. Title 28, Sec. 1257 (3).

QUESTIONS PRESENTED

Whether, under the facts present, petitioner's Constitutional rights were violated when her husband was permitted to obtain a divorce from her under the Virginia statute allowing a divorce on the grounds of having lived separate and apart without any cohabitation and without interruption for two years.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, Amendment XIV, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Code of Virginia 1950, as amended, Sections 20-95 and 20-91 are set forth in the Appendix.

STATEMENT OF THE CASE

Petitioner and Respondent are husband and wife. On July 21, 1966, Petitioner was forced by her husband from the home where they resided in Norfolk, Virginia. Respondent thereupon filed a divorce action asking for a divorce from bed and board on grounds that Petitioner had deserted him. Petitioner filed responsive pleadings denying that she had deserted.

No hearing was had on the desertion claim. After two years had passed, Respondent amended his grounds for divorce asking that he be granted a final divorce on the grounds that the parties had lived separate and apart for two years. The lower court awarded the Respondent a final divorce on the grounds of separation for two years.

The Supreme Court of Appeals of Virginia rejected Petitioner's appeal, the effect of which was to affirm the decree of the lower court.

The Federal question was raised in the court of first instance in oral argument and was raised on appeal to the Supreme Court of Appeals of Virginia in the Petition for a Writ of Error and in oral argument in behalf of said petition.

In her Petition for a Writ of Error, Petitioner, in her errors assigned and questions involved in the appeal, asserted, among other errors the following:

1. The Court erred in entering a final decree of divorce on the grounds of continuous separation of the

parties for over two years, under the pleadings, evidence and law applicable to this cause.

4. The Court erred in entering a final decree of divorce on the grounds of continuous separation of the parties for over two years due to the law being unclear and ambiguous, which denied Defendant due process of law.

REASONS FOR GRANTING THE WRIT

In this case the Supreme Court of Appeals of Virginia has refused Petitioner's appeal and, accordingly, has decided adversely to her a federal question not theretofore determined by this Court. Accordingly, the Constitutional rights of Petitioner and her family, and others similarly situated, have been violated.

Respondent created a situation that made it necessary for Petitioner and her two children to leave home for their own safety and to remain away under advice of a physician. Respondent immediately filed for a divorce asserting desertion by Petitioner. Petitioner denied the desertion, returned to live in the home at which time Respondent left and did not return.

Two years later Respondent changed his grounds for divorce from desertion to two years separation and was awarded a divorce on said grounds. Thus Respondent, a wrongdoer, under the Virginia statutes applicable, prevails over one who had done no wrong, with a result that, if allowed to stand, deprives Petitioner of basic Constitutional rights.

Petitioner's desire to preserve the family unit has

been used against her and she has been deprived of rights as an innocent party, falsely accused, to disprove the alleged desertion. The statutes in point do not distinguish between desertion and separation as applied to the facts here present.

The two year separation statute is unclear and ambiguous viewed in the light of the desertion statutes and its application in the instant case clearly violates Petitioner's Constitutional rights.

To apply the two year separation statute to the instant case is a clearly unfair and inequitable application of such statute against Petitioner in denial to her of due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

ARLENE E. DALY

By: JAY M. BALL
Counsel for Petitioner

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of March, 1970.

The petition of Arlene E. Daly for an appeal from a decree entered by the Circuit Court of the City of Norfolk on the 18th day of September, 1969, in a certain chancery cause then therein depending, wherein George D. Daly, Jr., was plaintiff and the petitioner was defendant, having been maturely considered and a transcript of the record of the decree aforesaid seen and inspected, the court being of opinion that there is no reversible error in the decree appealed from, doth reject said petition, and refuse said appeal, the effect of which is to affirm the decree of the said circuit court.

A Copy,

Teste:

Howard G. Turner, Clerk

By:

/s/ R. P. Tomlinson

Deputy Clerk

Code of Virginia, 1950, as amended, Section 20-95. Grounds for divorces from bed and board.—A divorce from bed and board may be decreed from cruelty, reasonable apprehension of bodily hurt, abandonment or desertion.

Code of Virginia, 1950, as amended, Section 20-91. Grounds for divorce from bond of matrimony.—A divorce from the bond of matrimony may be decreed:

(1) For adultery, or sodomy or buggery;

(2) For natural or incurable impotency of body existing at the time of entering into the matrimonial contract;

(3) Where either of the parties subsequent to the marriage has been sentenced to confinement in the penitentiary of this State or of any other state of the United States or to confinement in a penitentiary of the United States, and cohabitation has not been resumed after such confinement (in which case no pardon granted to the party so sentenced shall restore such party to his or her conjugal rights);

(4) Where prior to the marriage, either party, without the knowledge of the other, had been convicted of an infamous offense;

(5) [Repealed.]

(6) Where either party wilfully deserts or abandons the other for one year such divorce may be decreed to the party abandoned;

(7) Where, at the time of the marriage, the wife without the knowledge of the husband was with child by some person other than the husband;

(8) Where prior to the marriage the wife had been, without the knowledge of her husband, a prostitute, such divorce may be decreed to the husband; and

(9) On the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for two years. A plea of res adjudicata or of recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground.